

Service Date: January 31, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Application of)	UTILITY DIVISION
JATO Communications, Corp. and)	
U S WEST Communications, Inc.)	DOCKET NO. D99.10.245
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	ORDER NO. 6226
Approval of their Wireline Interconnection)	
Agreement)	

FINAL ORDER

Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)¹ was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically-monopolistic local exchange markets. The 1996 Act requires companies like U S West Communications, Inc. (U S West) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. U S West Communications, Inc. (U S West) entered into an interconnection agreement with JATO Communications Corporation (JATO) for interconnection and resale of U S West services according to the 1996 Act. U S West filed the parties' agreement, entitled "Interconnection Agreement Between U S West Communications, Inc. and JATO Communications Corp. for Montana" (Agreement) with the Montana Public Service Commission (Commission) on October 29, 1999. The Agreement was docketed as D99.10.245 and it provides for interconnection and for JATO to resell U S West's local exchange services in Montana.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

3. The Commission issued a Notice of Application for Approval of Interconnection Agreement and Notice of Opportunity to Intervene and Comment on November 3, 1999, giving public notice of the requirements that the Commission must approve the Agreement unless it finds the Agreement discriminates against other telecommunications carriers not parties to the agreement, or is not consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by November 15, 1999. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than November 26, 1999.

4. No hearing has been requested and no comments or requests for intervention were received. The JATO Agreement is substantially the same as previously approved interconnection agreements between U S West and other competitive local exchange carriers (CLECs).

5. The Commission rejects the contract sections discussed below consistent with other resale agreements that U S West has negotiated with CLECs.

Applicable Law and Commission Decision

6. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the standards set forth in the 1996 Act must issue by January 27, 2000, 90 days following the submission of the JATO Agreement for Commission approval.

8. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUND FOR REJECTION. – The State commission may only reject –

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity[.]

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

11. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

12. No comments have been received that indicate the Agreement does not comply with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the Agreement is not consistent with the public interest, convenience and necessity. There have been

no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

13. With the exception of particular sections of the Agreement as specifically discussed below, the Commission finds that the terms in the Agreement appear to conform to the standards required by the Act and should be approved. In approving this Agreement, the Commission is guided by provisions in state and federal law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission rejects or comments on the following terms:

14. Ordering and Maintenance – Section 11.3.2 includes the following provision: "The Parties agree that they will not transfer to each other their respective end users whose accounts are in arrears. The Parties further agree that they will work cooperatively together to develop the standards and processes applicable to the transfer of such accounts." This provision has been included in previous interconnection agreements, and the Commission has found it not in the public interest.² In Order No. 5962a, ¶¶ 11-18, Docket No. D96.11.191, In the Matter of the Application of Citizens Telecommunications Company Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of its Resale Agreement with U S West Communications, Inc., and Docket No. D96.11.198, In the Matter of the Application of Montana Communications Pursuant to § 252(e) of the Telecommunications Act of 1996 for Approval of Its Resale Agreement with U S West Communications, Inc., the Commission addressed nearly identical language as follows:

[F]ollowing an initial review of the agreement, the Commission expressed concern and asked for input from the parties regarding the following contract clause included in both agreements at page 7:

² See, e.g., In the Matter of the Application of Covad Communications Company and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Interconnection Agreement, Final Order, pp. 4-7, June 16, 1999.

The Parties agree that they will not transfer their respective end user customers whose accounts are in arrears between each other. The Parties further agree that they work cooperatively together to develop the standards and processes applicable to the transfer of such accounts.

. . . The Commission requested that the parties respond to its concern that this clause is not consistent with the public interest, convenience and necessity as required by 47 U.S.C. . 252(e)(2)(A)(ii). The Commission indicated its concern that the customer's ability to change local exchange providers may be improperly and unreasonably restricted by this contract term, noting that there is no explanation of what is meant by "in arrears," there may be impermissible privacy violations resulting from this term, and that it might be an anticompetitive or an unfair trade practice.

Citizens and U S WEST filed a joint response to the Commission's request, stating their belief that the language is a necessary part of their agreement, attempting to address potential problems with unscrupulous customers who switch providers to avoid having to pay the existing provider's bill. They further stated:

Once a customer switches providers, it will be very difficult for the old provider to collect the unpaid bill. Additionally, a customer leaving behind an unpaid bill is a very high risk customer for the new provider. The parties have not yet been able to design an optimal system which will prevent abuses by the customer while minimizing the amount of actual credit information that is exchanged. That is why the second sentence of the language . . . requires the parties to continue working together to develop standards and processes applicable to the transfer of such accounts. As a reasonable interim measure, the parties agree that the current provider will not transfer a customer if that customer is in arrears. For example, if USWC refuses to transfer a customer to CTC, CTC will know that the customer needs to resolve a bill in arrears, without knowing any of the details of the customer's credit history. In the case of both USWC and CTC, arrears means the customer is in the late stages of a progressive effort to collect on a bad debt.

U S WEST and Citizens contend that the provision promotes the public interest by enabling carriers some means to protect their ability to collect bad debt, thereby preserving the financial health of the parties and keeping rates low for all

subscribers by reducing the cost of unpaid debt which ultimately would have to be absorbed by them. They state that it also provides a means to discourage bad faith actions of customers who switch carriers to avoid payment.

[Montana Communications] owner, David Wick, also responded to the Commission's request, stating that the transfer of information relating to customers whose accounts are in arrears is a positive approach to addressing fraud in the competitive market. Mr. Wick stated that, "This is not for the exclusion of any individual requesting service, but rather to help in determining deposit amounts and duration of holding deposits." Mr. Wick echoed some of the same concerns as U S WEST and Citizens, noting that there is a higher potential for the consumer to abuse the system in the competitive environment. Although this relates to only a small percent of the consumer base, according to Mr. Wick, resale margins are so small to start with and the exchange of basic information is only a means for managing potential losses.

The Commission is sympathetic to the concerns expressed by the parties and recognizes that the competitive local exchange market will likely create opportunities for customers to obtain services from alternate providers even though they may have delinquent accounts with a competitor. This will be a change for the incumbent LEC which has been the only provider of telecommunications service in the past and which still has near total market power, particularly in rural states like Montana. Its credit records will not be complete and it may have to develop new methods to screen new customers. Still, the incumbent LEC will have the benefit of its database records in the case of a reseller to show that service has been recently disconnected at a particular address and this may assist it somewhat in preventing unscrupulous actions by consumers. In the short term, its existing credit records should be reliable and useful for this purpose.

In Montana, regulated telecommunications providers such as U S WEST must provide service to all customers if they meet certain conditions set forth in Commission regulations. In certain instances, U S WEST may request and obtain advance payments, deposits, or other credit guarantees. Resellers are not subject to these credit regulations and they may take steps they deem necessary to prevent uncollectible accounts. As an example, resellers may rely on consumer credit reporting agencies, while the regulated incumbent may not use such reports for serving its residential customers.

The Commission expressed its concern for consumer privacy. Sharing credit information without the knowledge and consent of the customer involved violates the customer's reasonable expectations of privacy and should not be

permitted unless there is a compelling reason for such an invasion. The parties have not demonstrated that such a compelling reason exists and that other means of limiting potential losses are unreasonable, or that they may be substantially harmed if they are not permitted to exchange consumer information between them. The Commission further notes that telecommunications providers in the long distance segment of the industry have not been able to engage in the sort of exchange of information which may be permissible under the above-quoted provision. The privacy rights of consumers and their ability to choose a supplier of telecommunications services may not be trumped by the parties' concerns for uncollectible accounts.

The proposed term would also increase the opportunity for engaging in anticompetitive activity. Specifically, an account that is "in arrears" may be a valued customer who routinely pays bills a little late and has been permitted to do so by the provider. Although the parties stated in their response that this means that a customer is in the last states of a progressive effort to collect on a bad debt, that is not what it says, and in interpreting contract terms, the plain meaning of words used generally prevails. Webster's Ninth New Collegiate Dictionary (1988) defines arrears as "the state of being behind in the discharge of obligations." The Commission finds this term vague and overbroad, with the potential of unreasonably restricting consumer choice as the competitive market develops. Thus, it is not in the public interest.

See also, Order No. 5980, ¶¶ 12-19, Docket No. D97.2.32, In the Matter of the Application of Max-Tel Communications, Inc. and U S West Communications, Inc., Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Resale Agreement. The Commission reaffirms its analysis and conclusions from prior orders, and rejects the language quoted from Section 11.3.2 as not in the public interest.

15. Regulatory Approval – The Commission rejects Section 26.30, consistent with its rejection of identical language in other agreements. The Commission does not agree that the FCC has any authority to review this Agreement under the 1996 Act.³

16. In addition, the Commission notes the following language in section 11.3.1, Ordering and Maintenance: "JATO's end users contacting U S WEST Communications, Inc. will

³ Most recently the Commission addressed this matter in Order No. 6163, ¶ 16, In the Matter of the Application of CCCMT dba Connect! and U S West Communications, Inc.

be instructed to contact JATO; however, nothing in this Agreement, except as provided below, shall be deemed to prohibit U S WEST Communications, Inc. from discussing its products and services with JATO's end users who call U S WEST Communications, Inc. for any reason." The Commission has not rejected this language in past orders⁴; however, this language may be in conflict with ARM 38.5.4116, perhaps especially ARM 38.5.4116(1)(c). JATO and U S WEST Communications, Inc. can agree that nothing in their Agreement prohibits certain conduct, but if that conduct otherwise violates the law, the provision in the Agreement that sanctions such conduct is void. §§ 28-2-604, 28-2-701, 28-2-702, MCA. Any provision or term of this Agreement that is in conflict with the law, whether or not specifically addressed by the Commission, is rejected as a matter of law and not in the public interest.

17. The first sentence of section 7.3.4 reads, "JATO must use leased space promptly and may not warehouse space for later use or sublease to another provider." This language is ambiguous, but it must not be read as precluding the subleasing of collocation space. Rather, it should be interpreted as preventing the warehousing of space for the purpose of subleasing. So interpreted, this section is approved.

18. The last sentence of section 11.10.5 reads, "USWC agrees, however, that the application of this provision will be suspended for the initial three billing cycles of this Agreement and will not apply to amounts billed during those three cycles." This language is approved with the understanding that it does not affect the responsibility to get Commission approval prior

Pursuant to 252(e) of the Telecommunications Act of 1996 for Approval of Their Interconnection Agreement, Docket No. D99.2.37 (May 7, 1999).

⁴ See Order Nos. 6021 and 6021a, In the Matter of the Application of U S West Communications, Inc. Pursuant to § 252(e) of the Telecommunications Act of 1996 for Approval of Its Interconnection Agreement with Kevin Kerr dba Montana Tel-Net, Docket No. D97.7.135 (October 29, 1997 and December 18, 1997), where the Commission specifically addressed the language; and Order No. 6094, In the Matter of the Application of Dakota Services, Ltd. and U S West Communications, Inc. Pursuant to § 252(e) of the Telecommunications Act of 1996 for Approval of Their Interconnection Agreement, Docket No. D98.6.126 (August 8, 1998), and Order No. 6163, In the Matter of the Application of CCCMT dba Connect! and U S West Communications, Inc. Pursuant to 252(e) of the Telecommunications Act of 1996 for Approval of Their Interconnection Agreement, Docket No. D99.2.37 (May 7, 1999), where the Commission did not comment on similar language in the respective Agreements.

to disconnecting an end user customer, nor the notice requirements specified in the section.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S West is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. JATO intends to resell telecommunications services and interconnect with U S West in U S West territories throughout Montana. As a reseller of regulated telecommunications services in Montana, JATO is subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, JATO initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so.

3. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to § 252(e)(2)(A). Section

69-3-103, MCA.

7. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the JATO Agreement by January 27, 2000, or the Agreement will be deemed approved.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED that the resale agreement of the parties, submitted to this Commission for approval pursuant to the 1996 Act, is approved and rejected as discussed herein, subject to the following conditions:

1. The parties may file an amendment to the Agreement without delay consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 25th day of January, 2000, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.